IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR

SECOND APPEAL NO. 582 OF 2007

Gajanan s/o Narayan Uchegaonkar :: APPELLANT

-: Versus :-

Pandurang s/o Maroti Topre and
two others. . :: RESPONDENTS

CORAM : B.P. DHARMADHIKARI, J.
DATED : 28TH NOVEMBER, 2007

ORAL ORDER :

1. Heard Advocate Shri R. L. Khapre with Advocate Shri K. S. Narwade, for the appellant, a purchaser of the suit property during the pendency of the first appeal and Advocate Shri C. S. Kaptan, for respondent No. 1-original plaintiff.

2. Present respondent No. 2 is original defendant before the trial Court. A suit for specific performance filed by respondent No. 1 against respondent No. 2 came to be partly decreed by rejecting the prayer for specific performance of contract and ordering refund of amount of Rs. 17,000/- (earnest money) with 6% interest from the date of payment i.e. 01/02/1993 till realization. The said judgment and decree was challenged in first appeal under Section 96 by present respondent No. 1 and he also

filed execution proceedings for recovering the earnest amount. He procured attachment of suit property itself in that execution. The respondent No. 2 (original defendant) sold the suit property to the present appellant for Rs. 95,000/- and deposited the earnest amount with interest to the tune of Rs. 25,337/- in the Executing Court. The present appellant who purchased the property from respondent No. 2 was joined as respondent No. 3 before the appellate Court. The appellate Court after hearing the appeal allowed it and on 24/4/2007 granted decree for specific performance to the present respondent No. 1. Respondent No. 3-subsequent purchaser is in second appeal before this Court.

3. Advocate Shri Khapre contends that by attaching the suit property itself, respondent No. 1 has given up his right of specific performance. He states that facts in the judgment of Hon'ble Apex Court in the case of Ramesh & others Vs. Chunnilal & other reported **AIR 1971 SC 1238** are entirely different in as much as, there the unsuccessful plaintiff, after filing appeal obtained injunction to restrain the original owner from alienating the suit property. He contends that here the plaintiff wanted the suit property to be sold through the Court process so as to secure refund of his earnest money and as such by his own conduct, respondent No. 1 has given up his right of seeking specific performance. For that purpose, he

also invited my attention to the fact that in execution the amount of Rs. 2891/-, Rs. 10,000/- and Rs. 12,450/- have been paid by the present appellant. In addition, he also invited my attention to the application dated 27/02/2007 moved by the present respondent before the appellate Court seeking permission to deposit amount of Rs. 30,000/- only. He states that such offer is showing absence of bona fides in respondent No. 1 and respondent No. 1 ought to have normally offered the entire amount which he had received from the executing Court towards refund of sale consideration with interest and the balance sale consideration. He further points out that the present appellant would be rendered landless if the decree for specific performance is maintained while respondent No. 1 (original plaintiff) has got several field properties and hence, the exercise of discretion by the trial Court in refusing the specific performance could not have been interfered with by the appellate Court.

4. In reply, Advocate Shri Kaptan points out that on 27/02/2007 before the appellate Court the present respondent No. 1 filed reply to the application filed by the present appellant for dismissal of appeal pointing out that he is ready and willing to deposit entire amount which he received from the Court towards refund of earnest amount and any other amount which the Court may direct him to pay on that account together with

balance sale consideration. He contends that the application for dismissal of appeal moved by the appellant was rejected by the appellate Court and the appellant then challenged the said order in revision before this Court which was held to be not maintainable. He further states that use of discretion by the trial Curt was for the original owner i.e. respondent No. 1 and not in relation to transfer or possession in favour of the present appellant.

5. After hearing the parties, I find that the present respondent No. 1 has sought refund of earnest money by protecting his right for specific performance and accordingly he got refund of earnest money with interest and costs of the suit and execution. He cannot be blamed for recovering the costs of the suit and costs of execution as the present respondent No. 2 did not himself deposit that amount. Though he attached the property agreed to be purchased by him for recovery of that amount, the matter in execution did not proceed further and respondent No. 2 entered into private arrangement with the present appellant and sold the property. Thus, the sale by respondent No. 2 of the suit property is not in dispute and as such, use of discretion by the trial Court in relation to original defendant (present respondent No. 2) ceases to have any relevance in so far as the said controversy or its continuation in first appeal or second

appeal is concerned. The appellant has purchased the property with open eyes and has taken the risk. The appellate Court has exercised the powers available to it in law and in the circumstances mentioned above, it was not concerned with the use of discretion by the trial Court. When it is found that defendant has sold the property to the present appellant, the decree for specific performance in favour of the original plaintiff cannot be allowed to be challenged on the ground of availability of discretion under Section 20 of the Specific Relief Act. to the Court.

6. It is no doubt true that in Exh. 39 filed on 27/2/2007 the present respondent No. 1 has stated that he is ready and willing to deposit entire amount of Rs. 30,000/- as per the sale agreement. However, it is to be noted that there was the application moved seeking permission to deposit the amount and on the very same day another reply was filed by him as mentioned above on verification stating that he is ready and willing to deposit the amount recovered by him in execution Case No. 114 of 1999 with balance sale consideration and the other amount which the appellate Court may decide in this respect. It is therefore clear that the bona fides of offer of the appellant to deposit the amount in this respect cannot be doubted or questioned only by pointing out that there was inconsistency in amount mentioned by him in his reply or in his application.

7. In these circumstances, I find that the appellate Court was justified in relying upon the judgment of the Hon'ble Apex Court mentioned above and in granting specific performance to the present respondent No. 1. No substantial question of law arises for determination in the second appeal, the same is accordingly dismissed. However, in the circumstances of the case, there shall be no order as to costs.

JUDGE

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